OG HEIGHTS MANAGEMENT CORPORATION A

v.

ONE AUG LAND SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR B
PRASAD SANDOSHAM ABRAHAM J
[SUIT NO: S-22-544-2007]
8 FEBRUARY 2012

CIVIL PROCEDURE: *Injunction - Mandatory injunction - Application for - Balance of convenience - Whether benefit to plaintiff outweighed detriment to defendant - Whether fair result achieved if injunction allowed* C

TORT: *Nuisance - Adjoining property - Defendants' site clearing and pre-piling works led to landslides causing damages to plaintiff's property - Whether defendant's activities on adjoining property caused landslides - Evidence adduced - Whether case actionable for nuisance* D

TORT: *Negligence - Breach of duty - Whether proved - Actions taken by defendants in developing adjoining property - Whether landslides due to defendants' negligence* E

This was the plaintiff's claim against all four defendants for nuisance and/or negligence and/or trespass. The plaintiff complained that the defendants' activities on the adjoining F property had caused landslides to occur. The 1st defendant was the developer of the 2nd defendant's property which was on a slope of more than ten metres higher than the plaintiff's property which was adjoined on its northern boundary ('the slope'). On 25 December 2005, a landslide occurred and the plaintiff claimed G that it was due to the site clearing and pre-piling works undertaken by the defendants. The retaining wall inside the plaintiff's property was destroyed and the earth from the landslide blocked the drains causing one of the two ramps in a car park which served the residents of the plaintiff's condominiums to be H closed. The situation was further aggravated when another landslide took place on 7 January 2006 causing more rubble and debris to fall onto the plaintiff's property. In the backdrop of the landslides, the defendants erected a wire netting cage filled with rocks ('the gabion wall') on its side of the land. The plaintiff I expressed reservation on the construction of the gabion wall and

A complained that it was poorly constructed, of poor quality, bulging and would probably collapse. The plaintiff also complained that the cantilevered structures were illegal. The defendants on the other hand, claimed that the landslide was caused by the plaintiff but agreed that the retaining wall destroyed by the landslide was B rebuilt by them.

Held (dismissing plaintiff's application against 3rd and 4th defendants with costs; dismissing plaintiff's application against 1st and 2nd defendants with costs except for encl. 3 C and 15 where costs awarded to plaintiff):

(1) In regards to the plaintiff's plea in nuisance, there was insufficient evidence connecting the landslides to the defendants. The evidence adduced showed that landslips on the plaintiff's property had taken place even before the D defendants started clearing. Furthermore, the plaintiff's witnesses could not confirm that it was the defendants' activities on the adjoining property that had caused the landslips to occur on 25 December 2005 and 7 January 2006. (paras 5 & 9) E

(2) The defendants had taken all reasonable and prudent steps in carrying out the development on the adjoining property and thus, had not breached their duty of care to the plaintiff. In fact, evidence showed that the defendants were prepared to F take reasonable steps in ensuring that future landslides would not occur. As such, there was insufficient evidence to suggest that the landslides experienced by the plaintiff were due to the defendants' negligence. (para 10)

G **(3)** There was no evidence tendered to show that the gabion wall was not functioning. The plaintiff could not be allowed to insist on fullproof measures to strengthen the gabion wall without contributing to the costs to undertake the same. Hence, the remedial measures specified by the experts for the H gabion wall was to be undertaken and the costs to be equally borne by the plaintiff and the first and second defendants. The plaintiff should also accept the reality of the adjoining development *albeit* on a hill slope could cause a certain amount of interference on the plaintiff's property. (paras 11 & 12)

I

(4) The plaintiff also sought a mandatory order to cause the cantilevered structures to be torn down which was mandatory in nature. However, it was dissatisfying that on a balance, the benefit to the plaintiff would not be outweighed by the detriment caused to the defendants. As such, a fair result would not be achieved if an injunction was to be granted in this case. Instead, the plaintiff should have moved the planning authorities to take action against the defendants on the complaint that the cantilevered structures were illegal and if the plaintiff's plea was ignored, the plaintiff could have then moved the court for an order of *mandamus* to compel the authorities in carrying out their duties. The prayers sought in this case were therefore inappropriate. (para 14-16)

(5) The 3rd defendant was merely an independent contractor whereas the 4th defendant was a director of the 1st and 3rd defendants, and hence, were not the proper parties in a claim for nuisance and/or negligence and/or trespass. (para 2)

Case(s) referred to:
Bridlington Relay Ltd v. Yorkshire Electricity Board [1965] Ch 436 ***(refd)***
Chastey v. Ackland [1895] 2 Ch 398 ***(refd)***
Hunter and Others and Canary Wharf Ltd [1977] 2 WLR 684 ***(refd)***
Leong Bee & Co v. Ling Nam Rubber Works [1970] 1 LNS 59 PC ***(refd)***
Marcic v. Thames Water Utilities Ltd [2002] EWCA Civ 64 ***(refd)***
Tay Tuan Kiat & Anor v. Pritam Singh Brar [1986] 1 LNS 58 HC ***(refd)***
Wu Siew Ying v. Gunung Tunggal Quarry & Construction Sdn Bhd & Anor [2011] 1 CLJ 409 FC ***(refd)***

Other source(s) referred to:
Norchaya Talib, *Law of Torts in Malaysia,* 3rd edn, p 353-354

For the plaintiff - Balbir Singh; M/s Wan Balbir & Assoc
For the defendant - HW Wong; M/s KS Ong & Co

Reported by Melanie Murthy

JUDGMENT

Prasad Sandosham Abraham J:

[1] This case was heard by this court over a period of days and the trial was finally completed. Thereafter parties were directed to put in written submissions, and the court now delivers judgment

in respect of this matter. The court apologises to parties and to counsel for the delay in the delivery of this judgment, and records its appreciation to counsel for their efforts in their research and as a consequence, their assistance to court.

[2] The case involves the law of nuisance, negligence and the law of trespass. Before I proceed to deal with the facts of the case, I first would deal with the question of the proper parties before the court, namely whether the proper defendants had been cited. There is no doubt the plaintiff has a proprietary interest in the land to maintain this action. The question to be asked is who can be sued? The law maintains the source and the creator of the interference will be liable for nuisance. He who authorises the impugned activity from which the interference is foreseeable would be liable and should be the defendant. Looking at the defendants in this case, it is my view that the plaintiff's claim is only sustainable against the 1st and 2nd defendants, as the 3rd defendant was merely an independent contractor, and the 4th defendant a Director of the 1st and 3rd defendants. I therefore rule the claim of the plaintiff against the 3rd and 4th defendants is dismissed with costs as they are not the proper parties in a claim for nuisance and/or negligence and/or trespass. (See the case of *Marcic v. Thames Water Utilities Ltd* [2002] EWCA Civ 64; [2002] 2 All ER 55 p. 85 and see also *Law of Torts in Malaysia,* 3rd edn, Norchaya Talib p. 353-354)

[3] Undisputed Facts

1. The plaintiff is the registered owner of the Property held under Geran No. 13700, Lot No. 34105 Mukim Petaling, Wilayah Persekutuan and is the Management Corporation incorporated under the Strata Titles Act 1985 (Act 318) and is empowered to bring this action under the said Act.

2. The 2nd defendants is the owner of the Property held under Geran No: 6723 Lot No: 10122 and Geran No: 6724 Lot No: 10123 Mukim Petaling, Daerah Kuala Lumpur.

3. The 1st defendant is the Developer of the 2nd defendant's Properties.

4. The 3rd defendant is a contractor and its shares are owned by the 2nd and 4th defendants. The 2nd and 4th defendants are Directors of the 1st and 3rd defendants and were engaged in the day to day construction activities conducted on the 2nd defendant's land.

5. The Defendants' Properties adjoins the Plaintiff's Property on its northern boundary. It is on a slope of more than 10 meters higher than the Plaintiff's Property ('the slope').

6. One of the pre-requisites underlying the approval from DBKL to the defendants, prior to commencing the ground works was to build a reinforced concrete wall with the required bearing capacity to restrain the soil. The approval given by DBKL through their letter dated 29 April 2005 refers to KELULUSAN PELAN KERJA TANAH and subjected to certain conditions as stated in para. 6 as follows:

> "Walaupun kelulusan telah diperolehi oleh pihak tuan, pihak tuan adalah bertanggungjawab terhadap **hakisan tanah, pemendakan kelodak dan kerosakan yang akan terjadi kepada harta benda bersebelahan,** jalan-jalan, saliran air dan sebagainya akibat daripada kerja tanah yang dicadangkan". (refer page 1-4 Bundle B) attached to the submission.

7. The 3rd defendant is alleged to have commenced work on the 2nd Defendant's Properties sometime in the latter half of 2005.

8. The plaintiff was concerned about the manner the defendants were undertaking the project because the defendants were clearing the slope of all vegetation without taking any precautionary measures to prevent the soil from washing onto the plaintiff's property and affecting the stability of the slope between both properties. The plaintiff was also concerned that the 3rd defendant would by their employees and agents encroach onto the Plaintiff's Property.

9. On the morning of 25 December 2005, a landslide occurred as a result of the site clearing and pre-piling works the defendants were undertaking (as claimed by the plaintiff), and destroyed the retaining wall (which was a reinforced concrete

structure with steel bars) inside the plaintiff's property. Earth from the landslide blocked the drains and caused one of the two ramps in Ruby Tower car park which served the residents of the plaintiff's condominiums to be closed.

10. The plaintiff called for a meeting with the 4th defendant which was held on 31 December 2005.

11. A further landslide occurred on 7 January 2006, which further aggravated the situation causing more rubble and debris to fall onto the Plaintiff's Property.

12. The defendants claim that the landslide was caused by the plaintiff but agreed that the retaining wall that was destroyed by the landslide was rebuilt by the defendants.

P: Do you agree that you rebuilt it?

DW1: Yes.

13. On or about 12 January 2006, the 3rd defendants then gave the plaintiff a sketch plan purportedly done by its engineer on its proposed solution (refer p. 66 and 67 bundle B).

14. The plaintiff requested for further details by its letter dated 16 January 2006. To date, no response has been received (refer p. 40 bundle B). The defendants had also not disclosed its approvals for the development.

15. The 3rd defendant's letter dated 12 January 2006 proposed for a gabion wall, ie a wire netting cage filled with rocks to be erected and placed at the boundary of the Properties. The plaintiff was not agreeable to this method as this technique of stabilising the slope using a Gabion Wall was a short term solution. The average life span of a gabion wall is only five years and up to a maximum 25 years whereas the building and structures on the slope it supports is designed to last 125 years. This information was extended to the plaintiff by the Institute of Engineers Malaysia in an article entitled "Retaining Walls and Why They Sometimes Fails". It states that gabion walls are temporary structures (refer p. 107-110 bundle B) attached hereto.

16. The plaintiff caused its solicitors Messrs Yap Hussin Loke & Loh to issue a letter dated 18 January 2006 to the 1st defendant requesting for documents, approved plans and to repair the damage (refer p. 95-97 bundle B).

17. The plaintiff received no response, so the plaintiff then requested the assistance of its Member of Parliament, YB Teresa Kok. Upon her intervention, DBKL responded by sending one of its engineers, one Ir. Tham Kok Seng to attend a meeting on 15 February 2006 which was attended by the 2nd and 4th defendants. At the meeting, the plaintiff learnt that the defendant had not submitted a plan for the slope works earlier and had done so only two days before ie, 13 February 2006 and when the 3rd defendant started work and piling on the slope, they had not yet submitted any engineering plans or received any approval for such work undertaken. This was also a breach of the Development Order. (again as claimed by the plaintiff)

18. The defendants then sent their workers to clear the debris and to remove the collapsed retaining wall. The defendants also started work on laying out the gabion wall on the defendants' boundary but failed to lay a base, ie, to remove the clay material and replacing it with hardcore or sand. The defendants also failed to lay a geotextile layer at the back of the gabion wall so that the gabion wall could withstand lateral tensions which would result in movement or the sliding of the wall, and serious bulging at various points and the flow of fine sand and water through the gabion wall whenever it rained would cause instability to the gabion wall, so claims the plaintiff.

19. The defendants on their own accord also proceeded to not only to reconstruct the retaining wall which was destroyed by the landslides which was about 5 metres in length, but they also went on to extend it across the entire face of the car park of some 20 metres in length allegedly without the plaintiff's consent.

[4] With regards to the issue of trespass of the gabion wall on a portion of the plaintiff's land, that, is no longer an issue as the defendants have conceded the fact of trespass, and the question of damages if any is left to be assessed.

[5] With regards to the plea of nuisance, it must be borne in mind that nuisance as a tort is not actionable *per se*. The plaintiff would have to prove that there was substantial interference with the use, comfort and enjoyment of the plaintiff's land and as a consequence there was physical damage to the land caused by the remaining defendants. See the case of *Leong Bee & Co. v. Ling Nam Rubber Works* [1970] 1 LNS 59 and I quote:

> Lord Atkin had described it as some degree of personal resposibility, in *Sedleigh-Denfield v. O'Callaghan* – is almost always necessary, and that generally involves foreseeablility. But this is not to say that foreseeability of injury to a neighbour is an ingredient in the tort. It means only that without proof of a likelihood which the person charged ought reasonably to have appreciated of injury to the neighbour's property foreseeability, it must be remembered, relates to likelihood, not bare possibility – there is, generally speaking, no ground for holding him guilty of detracting from the benefits which the neighbour was entitled to have of his property. Thus, as Lord Reid remarked in *Overseas Tankship (U.K) Ltd. v. Miller Steamship Co*. at p. 640 which was a case of a danger created in navigable waters, in the class of nuisance which includes creating such a danger foreseeability is an essential element in determining liability; not, that is to say, an element in the cause of action, but an element in the proof of responsibility for the creation of a danger that was real and substantial.

In our case, the complaint of the plaintiff was that the activities of the defendants on the adjoining land had caused landslips to occur on 25 December 2005 (see para. 9 statement of claim bundle A) and on 7 January 2006 (see para. 11 statement of claim bundle A). The defendants however as early as June 2005 had commenced development works on its adjoining land. I agree with the submission of counsel for the defendants on this point and I find as a fact that there has been no clear evidence to link the landslips on 7 January 2006 causally to the defendants and the landslips of 25 December 2005 to the defendants. The plaintiff's witnesses could not confirm this and PW3 specifically in his evidence states at p. 8 Q&A.

> Q: With regards to paragraph 10 & 11 of your witness statement – first you say it was the piling works, now you say it was the earthwork and the equipment which caused the landslide. Apart from your own say so, do you have definitive proof of the cause of the landslide you mentioned?

A: No we do not have any geotechnical engineer to tell us that.

Q: With regards to paragraph 13 – you agree you do not have any proof to support your suggestion that "the landslide definitely started from the Defendants land and was caused by the Defendant 'construction activities'?

A: Yes I agree."

[6] As a general rule, the defendant's is entitled to build on its own land although this right is subject to our system of planning controls. The fact the presence of building on the adjoining land and slope does not restrict the defendant's right to build. As Lindley LJ said in the case of *Chastey v. Ackland* reported in [1895] 2 Ch p. 398, and I quote:

> ... speaking generally, apart from long enjoyment, or some grant or agreement, no one has the right to prevent his neighbour from building on his own land, although the consequence may be to diminish or alter the flow of air over it on to land adjoining. So to diminish a flow of air is not actionable as a nuisance.

[7] Lord Hoffman in case of *Hunter and Others and Canary Wharf Ltd* had expressed the view the complaint of the plaintiff would be suitably resolved by using the mechanism of the existing planning system rather than *via* a court action for nuisance. (See also the case of *Bridlington Relay Ltd v. Yorkshire Electricity Board* reported in [1965] Ch p. 436). I refer to decision of House of Lord in the case of *Hunter and Others and Canary Wharf Ltd* reported in [1977] 2 WLR at p. 684 and in particular to the judgment of His Lordship Lord Goff of Chieveley particularly at p. 689, and I quote:

> As a general rule, a man is entitled to build on his own land, though nowadays this right is inevitably subject to our system of planning controls. Moreover, as a general rule, a man's right to build on his land is not restricted by the fact that the presence of the building may of itself interfere with his neighbour's enjoyment of his land. The building may spoil his neighbour's view (see *Attorney-General v. Doughty* [1752] 2 Ves. Sen. 453 and *Fishmongers' Co. v. East India Co.* [1752] 1 Dick. 163); in the absence of an easement, it may restrict the flow of air on to his neighbour's land (*Bland v. Mosely* [1587] 9 Co. Rep. 58a, cited in *Aldred's Case* [1610] 9 Co. Rep. 57b, and *Chastey v. Ackland* [1895] 2 Ch. 389); and, again in the absence of an easement, it

may take away light from his neighbour's window (*Dalton v. Angus* [1881] 6 App. Cas. 740, per Lord Selborne LC, at pp. 794-795, per Lord Blackburn, at p. 823): nevertheless his neighbour generally cannot complain of the presence of the building, though this may seriously detract from the enjoyment of his land. As Lindley LJ said in *Chastey v. Ackland* (a case concerned with interference with the flow of air), at p. 402:

> speaking generally, apart from long enjoyment, or some grant or agreement, no one has a right to prevent his neighbour from building on his own land, although the consequence may be to diminish or alter the flow of air over it on to land adjoining. So to diminish a flow of air is not actionable as a nuisance.

and also at p. 690 of the report, and I quote further:

> In the result I find myself to be in agreement on this point with Pil LJ, who delivered the judgment of the Court of Appeal [1996] 2 WLR 348, when he expressed the opinion, at p. 357, that no action lay in private nuisance for interference with television caused by the mere presence of a building. That a building may have such an effect has to be accepted. If a large building is proposed in a neighbouring area, it will usually be open to local people raise the possibility of television interference with the local planning authority at the stage of the appreciated for planning permission.

[8] It is therefore the view of this court, that the complaints of the plaintiff would have been best resolved by referring the matter to the appropriate planning authorities.

[9] It must be borne in mind that landslips on the plaintiff's land had taken place well before the defendants commenced the clearing of the land and the slope on its side of the boundary of the said land. (See p. 36 bundle B a letter from the plaintiff dated 29 November 2005, see also p. 65 bundle B ie, a letter from DW1 dated 29 December 2005, see plaintiffs' response at p. 38 bundle B letter dated 30 December 2005). Therefore it is the finding of this court that the landslips complained of by the plaintiff cannot be linked to the activities of the defendants on its land, particularly the clearing of the slope as alleged by the plaintiff.

[10] With regards to the plea of negligence, it is quite clear there is insufficient evidence to suggest that the development on the adjoining property was the primary cause for the landslips experienced by the plaintiff on their said land. I find that the defendants had taken all reasonable and prudent steps in carrying out the development on the adjoining property and I do not find they had breached their duty of care to the plaintiff. In fact evidence shows that they were prepared to take reasonable steps to ensure that landslips do not occur in the future. It is to be noted that except for the three landslips, no other incidents of landslips has taken place. (See the case of *Wu Siew Ying v. Gunung Tunggal Quarry & Construction Sdn Bhd & Anor* [2011] 1 CLJ 409)

[11] In the backdrop of these landslips, the defendants erected the gabion wall on its side of the land. The plaintiff expressed reservation on the construction of the gabion wall. (see p. 40 bundle B a letter dated 16 January 2006) The court observes far from being anxious about a possible calamity, the plaintiff was more concerned with extracting a win-all proposal for themselves including a new replacement wall at the cost of the defendants. On 15 February 2006, a meeting was held with DBKL, the plaintiff and the defendants (see p. 44-45 of bundle B). Subsequently after inaction on the part of the plaintiff, and thereafter, the plaintiff came back with issues as to the construction of the gabion wall. (See 98-101 of bundle B). The plaintiff's concern was the gabion wall was poorly constructed and was of poor quality and was bulging and would in all probability collapse. However there was no evidence tendered to show that the gabion wall was not functioning and a site visit by the court showed the gabion wall was in place except for certain areas of bulging. These comments came after the gabion wall was constructed.

[12] The court invited the experts of both the plaintiff and the defendants to narrow down the measures that could be taken to strengthen the gabion wall. The plaintiff's expert then produced a document which the court marked A which set out the areas of agreement in relation to the strengthening of the gabion wall. (See the case of *Bridlington Relay Ltd v. Yorkshire Electricity Board* [1965] 1 Ch p. 436). The experts are in unanimity in their view that the gabion wall is not in immediate danger of collapse. However

having heard the evidence of the experts and studied their reports, I am of the view the four remedial measures which both experts had agreed upon namely as set out:

(a) 150 mm thick gunite face (Grade 30) with two layers of steel wire mesh BRC DA8 to cover the exposed surface of the gabions.

(b) Adequate dowels, eg, T12x2m long dowels in 75 mm diameter drill hole grouted with Grade 30 cement grout, to be provided in order to hold the reinforced gunite face in place on the gabions.

(c) Adequate weep holes, eg, 75mm diameter perforated UPVC pipes wrapped with filter fabric, to be provided in the reinforced gunite face in order to allow for subsurface drainage (if any) through the gabion wall.

(d) Surface drain to be provided at the toe of the gabion wall in order to drain the surface runoff and subsurface water (flowing through the weep holes in the reinforced gunite face if any) to the adjacent discharge drain;

is to be undertaken and the costs of such remedial measures should be borne by the plaintiff and the defendants equally. I agree with the submission of counsel for the defendants that the plaintiff cannot be allowed to insist on fullproof measures to strengthen the gabion wall without contributing to the costs of undertaking the same. The plaintiff must accept the reality of the adjoining development *albeit* on a hill slope which may cause a certain amount of interference on the plaintiff's land. Determining the existence of the nuisance requires this court to strike a balance between the right of one party to use his property for his own lawful use and on the other hand, the right of the other party to the undisturbed enjoyment of his property. However in view of the evidence of the experts, the court is of the view a balance can be sustained by ordering the agreed remedial measures as recommended by the experts of both the plaintiff and the defendant alluded to earlier.

[13] With regard to the issue of the cantilevered structure, the plaintiff seeks according to their pleading in particular para. 18 & 19 statement of claim and seek in para. 31b(i) a removal of all structures found within five feet of the boundary of the plaintiff's property. It is the defendant's submission that since these properties had been sold to third parties who have not been made parties to this suit, the orders being sought should not be granted. The plaintiff on the other hand, submit the defendants knew all along of the plaintiff's complaint and chose to ignore the same and proceeded to transfer these properties to third parties. I agree with the submission of the counsel for the defendants that where mandatory orders are being sought, all the relevant parties should be before the court and the plaintiff should have taken steps to ensure that these purchasers were brought in as parties and since they were not on that ground alone, the claim in respect of cantilevered structure should be dismissed.

[14] The court notes the plaintiff seeks a mandatory order to cause the cantilevered structures to be torn down. The order sought is mandatory in nature and the court is not satisfied that on a balance, the benefit to the plaintiff (if at all) is not outweighed by the detriment that would be caused to the defendant. I refer to the decision of Singapore High Court in *Tay Tuan Kiat & Anor v. Pritam Singh Brar* reported in [1986] 1 LNS 58; [1987] 1 MLJ 276. Where His Lordship Thean, J in his judgment said and I quote at p. 279 of the report para. F left hand column to para. D right hand column:

> In my view, if the mandatory injunction asked for by the plaintiffs is granted obligations imposed on the defendant is extremely onerous and is out of all proportion to the benefit to be gained by the plaintiffs. In my view, it will not produce a fair result. In *Charrington v. Simons & Co. Ltd* the plaintiff complained that the defendants in breach of negative covenant re-surfaced a tract and raised the level thereof above that of the surrounding land belonging to the plaintiff who was cultivating an orchard on his land. The difference in levels of the track and the surrounding land interfered with or impeded the plaintiff's cultivation on the surrounding land and he brought the action against the defendant seeking, *inter alia*, a mandatory injunction requiring the defendant to remove any part of the track above the level of the surrounding land. Buckley J who heard the case granted the mandatory injunction but suspending it for 3 years, which

suspension, however, was lifted by the Court of Appeal: see [1971] 1 WLR 599. Buckley J in considering the grant of a mandatory injunction said, at p. 730:

> Where a mandatory order is sought the Court must consider whether in the circumstances as they exist after the breach a mandatory order, and if so, what kind of mandatory order, will produce a fair result. In this connection the Court must, in my judgment, take into consideration amongst other relevant circumstances the benefit which the order will confer on the plaintiff and the detriment which it will cause the defendant. A plaintiff should not, or course, be deprived of relief to which he is justly entitled merely because it will be disadvantageous to the defendant. On the other hand, he should not be permitted to insist on a form of relief which will confer no appreciable benefit on himself and will be materially detrimental to the defendant.

The concept of "fair result" as one of the criteria in determining the grant of a mandatory injunction was accepted by Megarry J. In *Shepherd Homes Ltd v. Sandham* where he said, at p. 351:

> Second, although it may not be possible to state in any comprehensive way the grounds upon which the Court will refuse to grant a mandatory injunction in such cases at the trial, they at least include the triviality of the damage to the plaintiff and the existence of a disproportion between the detriment that the injunction would inflict on the defendant and the benefit that it would confer on the plaintiff. The basic concept is that of producing a "fair result", and this involves the exercise of a judicial discretion.

[15] It is my view that if I grant such an injunction, a fair result would not be achieved in this case.

[16] As I have mentioned earlier in my judgment, this is a classic case where the plaintiff should have moved the planning authorities to take action against the defendants on the complaint that the cantilevered structures were illegal and if the plea of the plaintiff fell on deaf ears (which so often happens) the plaintiff could have then moved the court for an order of *mandamus* to compel the authorities to carry out their duties. The prayers being sought in this case are therefore not appropriate.

[17] In the light of the aforesaid and having duly considered the evidence in this case and the submissions of counsel the court makes the following orders ie.

1. Paragraph 31a, b, c, and d of the statement of claim is dismissed with costs, save and except for encl. 3 and encl. 15 where court awarded costs to the plaintiff in any event.

2. The court orders in respect of the gabion wall, the following remedial measures to be undertaken by the remaining defendants under the supervision of Ir. Tham Kok Seng and Ir. Dr. Affendi bin Abdullah at a cost not exceeding RM250,000 as follows:

   (a) 150 mm thick gunite face (Grade 30) with 2 layers of steel wire mesh BRC DA8 to cover the exposed surface of the gabions.

   (b) Adequate dowels, eg, T12x2m long dowels in 75 mm diameter drill hole grouted with Grade 30 cement grout, to be provided in order to hold the reinforced gunite face in place on the gabions.

   (c) Adequate weep holes, eg, 75mm diameter perforated UPVC pipes wrapped with filter fabric, to be provided in the reinforced gunite face in order to allow for subsurface drainage (if any) through the gabion wall.

   (d) Surface drain to be provided at the toe of the gabion wall in order to drain the surface runoff and subsurface water (flowing through the weep holes in the reinforced gunite face if any) to the adjacent discharge drain;

3. The plaintiff is ordered to pay half the costs of these remedial measures with respect to the gabion wall.

4. With regards to trespass on the plaintiff's land conceded to by the defendants. The matter is referred to the Timbalan Pendaftar for assessment of damages.

5. Parties be at liberty to apply.